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Reciprocity and the Law of Foreign Judgments: A Historical — Critical Analysis*

Arthur Lenhoff†

The vexing problem of reciprocity starts with the question: Why reciprocity? The question anticipates, of course, the existence of a clear concept of reciprocity. The difficulty with this question lies in the fact that reciprocity presents a broad general idea rather than a definite concept. However, any survey of its countless instances leads to the conclusion that their common characteristic points to a certain relation between a course of conduct of a person or persons or groups of persons and that of another person or other persons or groups. Among the groups, the States are, of course, the most important ones. And while the idea of reciprocity may still have some significance for the understanding of interesting legal phenomena within a State, that is, for questions of municipal law,¹ it is the fundamental basis of international law.

I

An independent State has exclusive jurisdiction in and over its territory, that is, it has territorial sovereignty. The conduct of a State may affect corresponding rights or interests of other States. As far as the rights of the latter are concerned their corollary are the international duties of the former.² The identity of the duties imposed upon every State eliminates any element of inequality, for the principle of sovereign equality³ is maintained by virtue of the equality in the limitations placed by equal duties upon each sovereign. Certainly, there is no interna-

*This study is based in part on an address "The Vexing Problem of Reciprocity," given by the author on May 19, 1955, at the meeting of the American Foreign Law Association in New York.

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1. See Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U.L. REV. 619-22 (1954).

2. In *Island of Palmas Case* (United States and The Netherlands), 2 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS 829, 839 (Permanent Court of Arbitration 1928), Arbitrator Max Huber states: "This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory."

3. Cf. U.N. CHARTER art. 2, ¶ 1.

tional authority to enforce duties by way of legal process.⁴ However, the interest in the performance of the duties is under the strongest guaranty, namely, that of reciprocity. A violation of duties imposed by international law might lead to reprisals which exemplify another function of the concept of reciprocity.⁵ Thus, a violation of diplomatic immunity may lead to the seizure of private property of nationals of the offending State. It appears, therefore, that reprisals are acts which are illegal in nature, but are recognized by international law as a lawful reaction of one State to actions committed by a foreign government in violation of international duties. Acts of reprisals are, therefore, sanctions for the commission of a wrongful act. Of necessity, international law permits them in the absence of a law-enforcing international agency; such a sanction is an appropriate method of self-help to which a Member or Members of the international community whose rights were violated by the delinquent Member may resort in order to obtain redress for the unlawful act.

Where the attitude of a State without being wrongful hurts the political, economic, or social interests of another State, measures of *rétorsion* taken by the latter against the former point to another facet of the reciprocity concept. What is in question is nothing else than an undesirable policy of a State expressed in legislative acts such as discriminatory restrictions on aliens or discriminatory tariffs or taxes or unfair administrative acts such as an unfriendly or even obstructive treatment of immigrants who are nationals of a certain State. Such a policy may induce the latter State to retaliate with similar or other unfriendly or discriminatory legislative or administrative measures against the subjects of the former State, measures which likewise are not illegal, but objectionable from the standpoint of the interests of that State.⁶ By using such lawful but not amicable measures the other State makes a psychological attempt to persuade the government of the former to change its policy which amounts, of course, to a change of its law.

4. The International Court of Justice is not an institution of general international law; for its jurisdiction is compulsory and obligatory only where it is so determined in treaties or by reason of the so-called "Optional Clause" provided for in article 36 of the Statute of the Court, binding also only upon those States who so choose. Cf. 2 OPPENHEIM, INTERNATIONAL LAW 58 (7th ed., Lauterpacht 1952).

5. For details, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U.L. REV. 619, 627 (1954).

6. *Id.* at 629.

II

As an illustration, cognate to the topic of this study, the attitude of a State to *international judicial assistance* may show the practical significance of that kind of retaliation. The term, coined,⁷ in the absence of an official English terminology (which exists in other languages⁸), designates the aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals,⁹ such as the procuring of evidence, especially testimony of witnesses in an action pending in such a tribunal, or the service of judicial documents in a foreign country.¹⁰ It may include the treatment of foreign litigants on the same footing as nationals with respect to such matters as relief from posting security for costs, or the granting of legal aid in conducting litigation by exempting a "poor party" from paying court fees, including fees of witnesses and experts, and even by procuring assistance of counsel whom, often, the court appoints.

The activities of the State which is requested to take evidence from a witness upon letters rogatory or to serve summons upon a party residing there amount to the cooperation in proceedings pending in a court of the requesting State. Those activities are carried out only upon the request of an organ of the foreign government. Furthermore, the business requested of the State is merely accessory to and dependent on the principal action which is conducted in the other State.

Either feature points to the difference between such acts properly classified as acts of assistance on the one hand, and those involving the recognition and enforcement of foreign judgments on the other. With respect to the latter, we have to

7. The name is used by Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953). REPORT OF COMMITTEE ON INTERNATIONAL JUDICIAL COOPERATION, PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, AMERICAN BAR ASSOCIATION (1950) speaks of international procedures. The Harvard Research in International Law, which had worked out a Draft Convention on Judicial Assistance, 33 AM. J. INT'L L. SUPP. 15 (1939), along with an excellent comment, uses, as the title indicates, the term "judicial assistance."

8. France: *Entr'aide* (in legal writings the words *commission rogatoire* are preferred); Italy: *Assistenza giudiziaria*.

9. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

10. In 1924 the League of Nations had inaugurated a study by a commission of experts on the problem which led to the report of the late Professor Schücking. See LEAGUE OF NATIONS DOCUMENTS [A.15(4).1927]. Cf. CUCINOTTA, L'ASSISTENZA GIUDIZIARIA NEI RAPPORTI INTERNAZIONALI (1935).

distinguish between the State of the forum, that is, the State in which a foreign judgment is to be enforced, and the State of rendition, that is, the State whose judicial tribunal rendered the judgment. Obviously, the task which the forum has to perform is not only in substance a different one from that with which a court originally rendering a decision is faced; but is also entirely independent from that foreign procedure.¹¹ For the forum, the proceeding involving a determination on the effects to be given a foreign judgment is a purely domestic action; its scope and termination is by no means prescribed or limited by a foreign authority. Taking the full measure of this analysis of an enforcement procedure as an entirely independent one which is a domestic action in the forum from its inception to the final determination, it might be proper to say that the difference in the origin of the judgment, whether foreign or non-foreign, does not count for anything as far as the character of the procedure as an exclusively domestic one is concerned. In giving effect to a judgment rendered abroad the forum does not lend any assistance to an adequate performance of its function by a foreign judiciary; it fulfills a task of its own in a proceeding not brought to it from abroad.¹²

It is much easier to grasp the nature of legal assistance to foreign proceedings than the conceptual and functional distinction which must be drawn between such assistance and the recognition and enforcement of foreign judgments.¹³ However,

11. See, e.g., 4 NEUMEYER, INTERNATIONALES VERWALTUNGSRECHT 354, 362 (1936).

12. Another difference, although of minor significance, lies in the fact that legal assistance is not necessarily a manifestation of judicial power. The requested state may, for example, permit the taking of evidence before a commissioner or counsel. By contrast the enforcement of a judgment is necessarily a judicial act. Cf. REPORT OF COMMITTEE ON INTERNATIONAL JUDICIAL COOPERATION, PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, AMERICAN BAR ASSOCIATION 49 (1950).

13. It was not without good reason that Harvard Research in International Law, *Draft Convention on Judicial Assistance*, 33 AM. J. INT'L L. SUPP. 15 (1939), had come to the conclusion that the two subjects call for a separate treatment. Whereas as a result of the negotiations at the first and second Conferences at The Hague on Private International Law in 1893 and 1894, on November 11, 1896, a Convention related to Matters of Civil Procedure, i.e., to matters of international legal assistance, had been signed (later substantially revised at the Fourth Conference in 1904 and, as revised, signed on July 17, 1905 — not ratified or adopted either by Great Britain, Russia, or the United States; but in operation in 22 European countries) no progress has been made as to an international convention concerning foreign judgments. The fifth and sixth Hague Conferences on Private International Law in 1925 and 1928, respectively, dealt with the subject; at the fifth Conference a draft Convention was voted for on November 7, 1925. For the history of the draft see Wigmore, *The Execution of Foreign Judgments: A Study in the International Assimilation of Private Law*, 21 ILL. L. REV. 1

by taking account of that difference, some progress could be made in the appreciation of both the usefulness of the application of ideas of reciprocity to the performance of international legal assistance and the worthlessness of such an application for the approach of foreign judgments.

It is manifest that the performance of legal assistance abroad is of primary importance for the State administering justice. Government is intent on affording an efficient judicial and administrative procedure as means of obtaining truth in cases to be decided by its own tribunals through a method which is able to overcome evidentiary difficulties in space without baffling sacrifices in time and expenses. We can at any rate perceive the fact that, because every State is greatly concerned in the proper administration of justice, the State asking for legal assistance is acting in the highest interest of its own.

The degree of that interest of a State varies with the extent of its international economic interests. This might explain why, even at present, despite the immense intensification of international trade relations and the immense facilitation of trans-national travel, general international law has not yet evolved the idea that non-compliance with a request for legal assistance constitutes an international delinquency.

Consequently the compliance with a foreign tribunal's request for international legal assistance is, in absence of a treaty,¹⁴ a matter of domestic law for the requested State. In general, the manner in which the domestic law in this country has approached and treated the subject leaves much to be desired.¹⁵ There is

(1926). A draft convention met with no success. See Merz, *Die fuenfte Haager Konferenz fuer internationales Privatrecht*, in DRUCKSCHRIFT NO. 19 DER SCHWEIZER VEREINIGUNG FUEER INTERNATIONALES PRIVATRECHT (1927). At the seventh Conference at The Hague, a resolution was passed, calling for new efforts to obtain the ratification of the 1925/1928 draft convention. Cf. CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES DE LA SEPTIÈME SESSION 401 (1952).

14. According to the Report rendered at the International Bar Association Meeting in Madrid 1952 by R. AGHABABIAN, *LA COOPÉRATION ET ASSISTANCE JUDICIAIRE INTERNATIONALE* (mimeo. 1952), there had been entered into from 1905-1939 more than 125 bilateral Conventions on the subject. No international-judicial-assistance agreement proper exists to which the United States is a party. However, Consular treaties permitting United States Consular officers to take depositions of American citizens only exist with 23 countries. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 523 (1953).

15. See REPORT OF COMMITTEE ON INTERNATIONAL JUDICIAL COOPERATION, PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, AMERICAN BAR ASSOCIATION 47-50 (1950). See also H.R. 5061, later H.R. 7500 and S. 1597, 84th Cong., 1st Sess. (1955), bill to establish a Commission and Advisory Com-

some legislation in several foreign countries providing for the granting of international legal assistance.¹⁶ Such legislation is not to be found either in Germany or in France. Therefore, in these Code States no legal command imposes a duty upon the domestic tribunals to comply with a foreign court's request expressed in letters rogatory.¹⁷

However, a warning against careless analysis seems to be pertinent. The fact that the domestic law expressly provides for international legal assistance has, from the standpoint of international law, no more weight than the opposite, namely, the absence of express legal norms. In case of an erroneous refusal of assistance, the party aggrieved may appeal as in any other case of a wrong interpretation of a norm of municipal law. This has nothing to do with international law; for, since no rule of general international law imposes a duty to grant such an assistance, this kind of international cooperation, if carried out, is viewed from the perspective of international law as a matter of good will and civility, performed "*à titre de courtoisie internationale*," or as "*comitas gentium*."¹⁸ Since the refusal of this usage of "comity" seriously interferes with an important interest of the requesting State, that is, the interest in its proper administration of justice, such an absolute refusal will rarely occur;¹⁹ but, if it happens, it is regarded as an unfriendly²⁰ act unless there are good reasons for the refusal, such as the inconsistency of the request with leading principles of the procedural law of the requested State. By this token, the refusal, for example, to comply with an American request for examining a party as a witness, where such examination is not allowed

mittee on International Rules of Judicial Procedure. The Commission is to investigate and study existing practices of judicial assistance between the United States and foreign countries, with a view to achieve improvements. The adjournment of Congress prevented the final passage in the House, while action in the Senate awaited the report from the House.

16. For example, Belgium: Act of June 18, 1869, art. 139; Italy: CODICE DI PROCEDURA CIVILE art. 802; Austria: JURISDIKTIONSNORM (Statute on Jurisdiction of the Courts) § 38 (1895); Czechoslovakia: ZPO (Civil Procedure Law) § 627 *et seq.* (1950); Yugoslavia: ZPO § 36 (1929).

17. RIEZLER, INTERNATIONALES ZIVILPROZESSRECHT 674 (1949); MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVIL § 472 (2d ed. 1949).

18. The distinction between an international duty and a course of conduct suggested only by international comity is well drawn in STARKE, INTRODUCTION TO INTERNATIONAL LAW 19 (3d ed. 1954).

19. Lutterloh, *Zwischenstaatliche Rechtshilfe*, in 4 HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT 680, 684 (1927).

20. *Id.* at 684; LESKE-LOENWENFELD, DIE RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR 123, n. 35 (Magnus ed. 1930).

procedurally by the requested State, must probably be regarded as justified.

Turning to the possible reaction against an unjustified refusal of judicial assistance, it might be recalled that the request for such assistance issues from a government (and not, as in the case of the enforcement of a foreign judgment, from a private party). A government desirous of receiving such assistance from another one, can hardly with any grace ask for it, if it had previously shown some reluctance to be of service as to an analogous request from its opposite number. This explains the generally admitted fact that a request for legal assistance has to be construed as containing the implied, if not the expressed, promise to adhere to reciprocity.²¹ Where there are treaties dealing with such assistance, a reciprocity feature has always been included. Even where there is no treaty, the respect paid to the mutual interest in obtaining judicial assistance may, as we saw, be reflected in the reciprocal compliance with a procedure to that effect.²² If we ask what a State might do in the event of an unjustified refusal of assistance by another State, the answer is that the former may requite a bad treatment received with an analogous treatment given the latter, that is, by a measure of *rétorsion*. Thus, the regard or disregard given to the interest of another State designates substantially the dividing line between reciprocity and *rétorsion*.

III

This seems clear enough and may be helpful in discerning the main sources of error which accounted for the confusion permeating the *Hilton v. Guyot* decision.²³ In that case the Su-

21. For the reciprocity problem in international legal assistance see Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 532 (1953).

22. As an illustration, such a reciprocal willingness to grant legal assistance, in the absence of an agreement, exists between Germany and 31 countries, the United States being included in this figure. See ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS* 73 (6th ed. 1954).

23. 159 U.S. 113 (1895). The Court in a 5 to 4 decision refused to render a judgment enforcing (i.e., granting conclusive effect to) a French money judgment rendered against two Americans on a French cause of action, for the plaintiff, who was the official liquidator of a French firm. The reason for the refusal was seen in the fact that French law does not regard an American judgment as conclusive evidence of the claim adjudicated therein in favor of the plaintiff. A French court will not grant an *exequatur* before it is satisfied, *inter alia*, of the regularity of the proceeding had in the foreign court and of the application by the latter of the proper law. Cf. Perroud, *Décisions judiciaires étrangères*, in 5 REPERTOIRE DE DROIT INTERNATIONAL 351 (1929).

preme Court made reciprocity a requirement for the full recognition of the judgment of a foreign country by a federal court. One may add that it has never been disputed that from the standpoint of American constitutional law the question of whether, and to what extent, weight ought to be given to a judgment of a foreign country, falls within the authority of the states.²⁴ What, then, are the errors charged to the *Hilton* doctrine? In the first place, the Court confused the international problem with the rule of the domestic law, because the non-existence of an international duty does not affect the control of the situation by an affirmative domestic rule. The question of the recognition and enforcement of a foreign judgment is, as we might recall, always one of domestic law. Neither by the Anglo-American common law²⁵ nor by any federal or state provision²⁶ does such enforcement depend upon the reciprocal attitude of the State of rendition in the obverse situation.

In the second place, it is still true that despite strong arguments advanced to the contrary by one of the greatest among the "Grotians,"²⁷ Emerich de Vattel,²⁸ the treatment of foreign judgments is, aside from treaties, entirely a matter within the legislative discretion of the different States. However, where the municipal law such as the Anglo-American common law provides for the recognition and enforcement of foreign money judgments without making reciprocity one of the requirements, the granting of those effects to such a judgment is not a matter

24. For details, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U.L. REV. 619, 762 (1954).

25. DICEY, *CONFLICT OF LAWS* 403 (6th ed., Morris 1949): "The question of giving effect to a foreign judgment is not at common law in any way dependent on reciprocity of treatment."

Only in the most recent legislation, reciprocity is given some thought. See Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 GEO. V, c. 13, § 1. However, the question of direct enforceability after registration has, of course, nothing to do with the question of recognition of a foreign judgment. The act refers only to the former, not to the latter. See also Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 INT'L & COMP. L.Q. 49 (1954).

26. The absence of a statutory provision was admitted by Mr. Justice Gray, who expressed only his doubts whether a statute, if enacted, would dispense with a reciprocity feature.

27. The name designates that classical school of international law which stands midway between the "naturalists" who attempted to derive the concepts of that law from the "law of nature," and the "positivists," who pushed positive law to the fore at the expense of the natural law. 1 OPPENHEIM, *INTERNATIONAL LAW* 94 (7th ed., Lauterpacht 1948).

28. in 2 DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* c. 7, § 85 (1758) [reprinted in 1 *CLASSICS OF INTERNATIONAL LAW* 318 (1916)]. He thought that each decision rendered by a court within the limits of its jurisdiction should be given recognition everywhere.

of comity on the part of the court in the forum, but a matter of duty imposed by a command of municipal law. Ergo, the whole talk in the *Hilton* opinion about "the comity of our nation not requiring us to give conclusive effect to the judgments of the courts of France" was from the standpoint of legal analysis absolutely wrong. Brief as the dissenting opinion delivered by Chief Justice Fuller is, the correct view to be taken of the matter is expressed in one remarkably accurate and lucid passage of his:

"The application of the doctrine of *res judicata* [regarding the French judgment] does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary."²⁹

To mention the question of the desirability or necessity for retaliatory measures against a State because its municipal law does not grant conclusive (*res judicata*) effect to a foreign judgment means to direct attention to a third erroneous assumption underlying *Hilton v. Guyot*. Our previous analysis has led us to the conclusion that the treatment of a judgment abroad is not a matter in which the judicial administration of the State of rendition has a reasonable interest as is the case with the assistance by the foreign judiciary to the smooth and complete disposition of a pending controversy. As it will be seen, the insistence of a State on reciprocity regarding the treatment of judgments rendered by its courts, may have its roots in considerations of prestige; but it is not true that, in general, the reason must be found in the natural interest of a State in the protection of rights acquired by its nationals. If such were the case, the German courts, for example, would enforce an American judgment rendered in favor of a German party; but they deny the enforcement regardless of the nationality of the victorious party.³⁰ Conversely, it is highly improbable that the judgment-state has any interest in seeing a judgment rendered by its own court for an alien, and against its national, enforced in the former's country at the expense of the latter's economic existence there. On the contrary, there is every reason to believe that the judgment-state would have the opposite interest.

29. *Hilton v. Guyot*, 159 U.S. 113, 234 (dissenting opinion) (1895).

30. Germany: ZIVILPROZESSORDNUNG (Code of Civil Procedure) § 328; cf. especially Süss, *Die Anerkennung ausländischer Urteile*, in BEITRÄGE ZUM ZIVILPROZESSRECHT (FESTGABE FÜR LEO ROSENBERG) 229, 236 (1949).

The truth of this observation has been so intelligible that, despite the inspirational power which ordinarily important decisions of the Supreme Court exercise upon the courts in the sister states, such was not the case with the *Hilton* decision. Only a very few state courts have adopted its doctrine, and New York, Massachusetts, Illinois, and California — states before the courts of which most of the cases involving foreign judgments have been brought — have not joined the minority.³¹

The subject of this study does not extend to a further discussion of the *Hilton* case, particularly of its range.³² The imprint of the case was a new one upon the law of this country because it was, as we saw, a break with the common law and its tradition. However, the majority opinion could refer to parallel requirements in the law of many foreign countries.³³ The following attempt to inquire how it happened that the idea of reciprocity forced its entrance into the area of municipal law under discussion might have its significance at present for bringing to the fore the essential considerations to guide our legislative policy in an era of closest international connection.

IV

Historically speaking, the role of reciprocity in the recognition and enforcement of foreign judgments is a modern creation. Understandably, we find, within the field of public international law, very early reciprocal treaties as those concerning extradition of felons³⁴ and others dealing with protection and commercial advantages for merchants.³⁵

31. For this minority see *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 Atl. 715 (1929); *Traders Trust Co. v. Davidson*, 146 Minn. 224, 178 N.W. 735 (1920). See also *In re Vanderborcht*, 91 N.E.2d 47 (Ohio 1950). All the other states have ignored the *Hilton* philosophy as so did *RESTATEMENT, CONFLICT OF LAWS* § 433 (1934). See also *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926).

32. For a discussion on this and other related questions see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 760-63 (1954).

33. For a list of countries whose law has accepted the postulate of reciprocity for the enforceability of foreign judgments, see von Simson, *Prozesswirkungen im internationalen Privatrecht*, in 4 RECHTSVERGLEICHENDES HANDWÖRTERBUCH FÜR DAS ZIVIL-UND HANDELSRECHT 536 (1933); see also Süss, *Die Anerkennung auslaendischer Urteile*, in BEITRAEGE ZUM ZIVILPROZESSRECHT (FESTGABE FÜR LEO ROSENBERG) 229, 248 (1949).

34. Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law and International Law*, 15 U. PITT. L. REV. 44, 45, n. 6 (1953).

35. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 30 (1947).

We meet with reciprocity features in a few matters of private international law as early as in the twelfth century. Neumayer called attention to a statute of Como of 1219 which directed the magistrates to apply to aliens the same law as to citizens, that is, the *lex fori*.³⁶ This attitude was in line with the legal climate of the time. In the first stage of the medieval Italian judicial practice (in the eleventh and twelfth centuries) the courts decided in conflict cases according to the *lex fori*.³⁷ However, a discriminatory treatment against a Comonese in another city would lead the tribunals in Como to retaliate against a citizen of that city.³⁸ It seems that from the beginning of the thirteenth century the concept of the control of the *lex fori* was losing ground. For the choice of law more weight came to be given to that which the particular posture of the case required.³⁹ However, the reciprocity idea in form of *rétorsion* was not eliminated as to choice-of-law determinations. It is too well known to call for more than a reference that the glossators and post-glossators had traced problems of the conflict of laws back to a passage of the *Corpus Iuris Justinianei*.⁴⁰ But those great scholars found therein also a sentence⁴¹ on which they could build up, in terms of *rétorsion*, a theory of reciprocity for the private law of aliens, particularly in the law of succession.⁴² Treaties establishing the principle of national treatment are reported as of such an early date as the thirteenth century.⁴³

36. 2 NEUMEYER, DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS 18 (1916).

37. *Id.* at 13-20, 144 *et seq.*

38. *Id.* at 18. In the treaty between Venice and Genoa of 1218-1228 there also was a clause providing for *rétorsion*. *Id.* at 19.

39. 2 NEUMEYER, DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS 75 *et seq.* (1916). See also Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 302 (1953).

40. In the first words of the third part of the *Corpus Iuris Civilis*, that is, the *Codex Justinianus* (1.1.1), the basis was found for the principle that the court of the forum is not bound by a foreign rule. The first words are: *Cunctos populos quos clementia nostrae regit imperium*" (as the Glossators read the last word). This pointed to the thought that there are limits set to the ruling of the law of a State. Gutzwiller, *Internationales Privatrecht*, in 1 STAMMLER, DAS GESAMTE DEUTSCHE RECHT 1522 (1931); Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 302 (1953).

41. DIGEST 2.2.1.1. For the history, see the admirable study, Rapisardi-Mirabelli, *La Rétorsion — Etude de droit international*, 16 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 223, 232 *et seq.* (1914).

42. Thus, later on, STRYK, SPECIMEN USUS MODERNI PANDECTARUM 207 (6th ed. 1927) quoted: "*Quod quisque iuris in alterum statuerit, ut ipse eodem utatur.*"

43. Cf. 2 NEUMEYER, DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS 19 (1916); BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 873 (Howell transl. 1912).

It seems that relevancy of reciprocity for the questions of the enforcement, and even of merely the recognition of foreign judgments is a notion which was conceived much later. What is the explanation of this posteriority in point of time? May this fact not also make us apprehend why neither the English common law nor the medieval Continental-Roman common law had included a reciprocity concept in their dealing with foreign judgments? We might gain some insight into this historical phenomenon when we remind ourselves of a few legal-historical facts:

At the time when in the medieval Italian law schools the first roots of private international law were laid, the state-units in question were, from the standpoint of the then constitutional law and political philosophy, political divisions, cities endowed with substantial autonomy, within the only State, the Holy Roman Empire. The *statuta* were, therefore, local rules of customary nature within the realm of the imperial law, the Roman law.⁴⁴ Public instruments executed in another city or province than that of the forum were granted full faith and credit,⁴⁵ and as within any other political unit so was, within the conceptual unit embracing the Italian cities, judicial and administrative assistance given by the tribunals of one community to those of the other.⁴⁶ Thus, it was entirely in line with the whole legal picture that courts in one city attributed to a rendered judgment the effect of *res judicata* as between the same parties and the same issue (*eadem quaestio*), aside from the fact that its conclusive effect derived from its legal nature as a public docu-

44. 1 GOLDSCHMIDT, *UNIVERSALGESCHICHTE DES HANDELSRECHTS* 101 *et seq.* (1891); Gutzwiller, *Internationales Privatrecht*, in STAMMLER, *DAS GESAMTE DEUTSCHE RECHT* 1523 (1930): "The whole Christian World was, in the legal view, the territory of the medieval Empire governed by the Roman-common law." 2 STINTZING-LANDSBERG, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* 6 *et seq.* (1884).

45. See the passage in the compilation of Accursius called *Summa Authenticorum* (ascribed to Azo), Coll. 6, tit. 3, No. 2 (*de instrumentorum editione et fide* —Nov. 73) in Kremár, *Beitraege zur Geschichte des Internationalen Privatrechtes*, in 2 *FESTSCHRIFT ZUR JAHRHUNDERTFEIER DES ALLGEMEINEN BUERGERLICHEN GESETZBUCHS* 133, 146 (1911), and in 2 NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS* 52, 103 (1916).

46. Where a national had abroad assumed obligations contained in a foreign instrument, some limitations are placed upon the evidentiary effect of the instrument; but in general, private legal instruments had been granted recognition. 2 NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS* 52 (1916).

ment.⁴⁷ Obviously, this recognition was not conditioned upon the observance of reciprocity.

V

The requirement of reciprocity for the recognition of foreign judgments emerged later. On the one hand, a feeling that the authority of the Emperor was a foreign one had not yet developed; on the other hand, the ideology underlying the whole concept of the Empire was a cosmopolitan one, that of a "world law" corresponding to the "one-world idea" of the medieval spirit.⁴⁸

The emergence of the *idea of sovereignty* followed the world-historical process of the transformation of vassals into independent rulers, or, what is only another formulation, of feudal seignories into States, by the splitting up of the Empire.⁴⁹ The development necessarily was to have its impact upon private international law. Along with the idea of sovereignty strong national feelings evolved:⁵⁰ Since acts of one State cannot operate *ex proprio vigore* within the territory of another state, with the latter claiming its sovereignty like the former, it was regarded as a matter of *comitas* to grant those acts, whatever they might be, laws or decisions alike, recognition. And a State proceeds "*ex comitate*," if and when its courteous attitude is reciprocated.⁵¹ Thus the motive of self-interest replaced the motive of doing justice which had inspired the formative era of private international law.⁵² The door was opened for letting

47. *Id.* at 53, 55, 103.

48. Words used by Krcmár, *Beitraege zur Geschichte des Internationalen Privatrechtes*, in 2 Festschrift zur Jahrhundertfeier des Allgemeinen Buergerlichen Gesetzbuchs 154, 156 (1911). See also the magnificent work of Koschaker, *Europa und das Roemische Recht* (1947) (*passim*).

49. For the creator of the theory of sovereignty, Jean Bodin (1530-1596) and his work [*Les six livres de la Republique* (1576)], see 2 Stintzing-Landsberg, *Geschichte der Deutschen Rechtswissenschaft* 34 *et seq.* (1884).

50. The idea of the "one" law (Roman law) in one world has been shaken. Now, the application of Roman law was explained with a voluntary reception, and not with the supreme legislative power of the emperor. This was particularly the argument of Hermann Conring (1606-1681) — called "the father of German legal history" — in his work, *De origine iuris Germanici* in 1643. 2 Stintzing-Landsberg, *Geschichte der Deutschen Rechtswissenschaft* 173 *et seq.* (1884).

51. See, e.g., Story, *Commentaries on the Conflict of Laws* 24 (7th ed. 1872).

52. Cf. Meili, *Ueber das historische Debut der Doktrin des internationalen Privat- und Strafrechts*, 9 Zeitschrift für Internationales Privat- und Strafrecht (Böhm's Zeitschrift) 1, 10 *et seq.* (1899).

in reciprocity as a requisite for the enforcement of foreign judgments even prior to the beginning of the last century.⁵³ However, reciprocity, as an almost standing feature in the law of a great many foreign States dealing with foreign judgments, bears the nineteenth-century mark.

The "Naturalists" and the "Grotians"⁵⁴ of the late seventeenth and of the eighteenth century had already preached the gospel that no sovereign is under an *obligation* from the standpoint of the law of nature to carry out acts of another sovereign.⁵⁵ This doctrine had, of course, its roots in the ideas of territoriality and sovereignty which had evolved on the Continent during the sixteenth and the first half of the seventeenth century, ideas which found their "pendant" in the nineteenth-century protectionism and nationalism.⁵⁶

The Continental doctrines which had indoctrinated the Americans Story and Wheaton, on whose books⁵⁷ the majority opinion in *Hilton v. Guyot* relied so heavily, were of pre-nineteenth century vintage such as those of Grotius, the two Voet, Ulrich Huber and Vattel, to mention the main sources. Mr. Justice Gray, unaware of the spirit of Nationalism as the founding father of the reciprocity features of the foreign laws to which he referred, would have protested that his nice distinctions⁵⁸

53. See the Boundary Treaty between France and Sardinia of March 24, 1760, stating that for the purpose of facilitating the *reciprocal* execution of judgments and orders, the highest court of one of the High Contracting Parties shall make these decisions of the other Party to be executed. See also the Austrian laws (*Hofdekrete*) of May 18, 1792, JGS No. 16, and February 15, 1805, JGS No. 711, concerning the enforcement of foreign judgments. Cf. Wittmaack, *Kann ein Vollstreckungsurteil nach §§ 722 und 723 ZPO auf Grund eines nordamerikanischen, insbesondere kalifornischen Urteils erlassen werden?*, 22 ZEITSCHRIFT FÜR INTERNATIONALES RECHT (NIEMEYER'S ZEITSCHRIFT) 1 *et seq.* (1912). The fact that only since the beginning of the nineteenth century a few German States has inserted a reciprocity feature into their laws concerning foreign judgments can also be seen from MITTERMAIER, VON DER VOLLSTRECKUNG EINES VON EINEM AUSLÄNDISCHEN GERICHTE GEFÄLLTEN URTHEILS, 14 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 84 *et seq.* (1831).

54. For these doctrines of international law, see note 27 *supra*.

55. For details, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U.L.Rev. 619, 752-73 (1954).

56. See the excellent book, ERNST, GEGENSEITIGKEIT UND VERGELTUNG IM INTERNATIONALEN PRIVATRECHT 94 *et seq.* (dissertation 1950).

57. Mr. Justice Gray drew particularly on STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 615-18 (7th ed. 1874); and on WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 78, 79 (Dana ed. 1866).

58. I think of the dividing line drawn in the opinion between a course which involves international obligations arising *ex proprio vigore* or *ex debito iustitiae*, and another course which may be taken only *ex comitate*. The weakness of this basis as far as the question of foreign judgments was concerned is discussed elsewhere in this paper.

appeared in a different light in 1895, from that which inspired their expounders such as Ulrich Huber and Vattel.

The historical link between eighteenth century sovereignty and nineteenth century nationalism is the imperialism of Napoleon Bonaparte. He used the appeal to nationalistic instincts as a means of creating new national states at the expense of the old empires. Upon his request the principle of national treatment of aliens, pronounced in the draft of the Civil Code, had been qualified by conditioning its operation on the existence of a treaty.⁵⁹ When, a few years later, the noted draftsman of the Austrian Civil Code, Franz von Zeiller, wrote the first Commentaries on this legislation, he remarked that, in the "*Tribunat*,"⁶⁰ Napoleon had argued that "without such a qualification the French legislation would become subject to the legislation of foreign States."⁶¹

No better illustration for the change from the eighteenth century spirit to the nationalistic harshness can be found than a comparison between the treatment of alien residents in a country when a war arises between it and their home country, as provided for in the American-Prussian Treaty of 1785 on the one hand, and Napoleon's action in 1803 on the other. According to that treaty, inspired by the young United States, aliens were "allowed to remain nine months to collect their debts and settle their affairs and they were further allowed to depart freely with their effects without molestation or hindrance."⁶² By contrast Napoleon decreed on May 23, 1803, that all British civilians in France between the ages of 18 and 60 should be interned.⁶³

The movements for political unifications, such as those in Germany and Italy during a large part of the nineteenth century, were nationalistic. However, nationalism had not only its impact upon the political map, but also upon legal ideology and policy.

59. See CODE CIVIL art. 11 (France 1804).

60. A legislative body which consisted of 100 members appointed by the Senate from panels submitted by the *départements*. All this reflects the success of Napoleon's *coup d'état*.

61. VON ZEILLER, COMMENTAR ÜBER DAS BÜRGERLICHE GESETZBUCH 144 (1811).

62. Treaty of Amity and Commerce of September 10, 1785, art. 23. See 2 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1477 (1910).

63. 1 THIERS, HISTOIRE DU CONSULAT ET DE L'EMPIRE 496, *libre* 17 (German ed. 1846); CHATEAUBRIAND, NAPOLEON 85 (ed. 1920).

One need only read the committee report of the German Diet concerning the draft of what was to become the German Code of Civil Procedure of 1877. Honor and dignity of the new German Reich, the majority believed, called for the insertion of a reciprocity feature.⁶⁴ But it is characteristic that the same German Code of Civil Procedure has not established reciprocity as a prerequisite for the executability of foreign private arbitration awards.⁶⁵ Here, again, we have a good example of the illogical use of the sovereignty idea in private international law. Foreign awards rendered by private arbitrators or arbitration boards are not regarded as acts of State. Ergo, the awards present a conclusive settlement of the matter barring the State in which they were rendered as well as the forum in which their enforcement is sought from retrying the facts.⁶⁶ An analogue can be found in the distinction drawn by American courts with respect to the enforceability of a deed concerning land abroad between its execution by an appointee of the court on the one hand, and by the party on the other. If executed by the former, it will not be enforced abroad, while a private deed is given the full effect of passing title, although the party acted under the compulsion of the decree.⁶⁷

The nationalistic trend towards the demand for reciprocity in the matter of foreign-court judgments can be seen in three ways. The *first* way has been followed by the native country of Grotius and Huber. The Netherlands has not changed its attitude of refusing the enforcement of foreign judgments⁶⁸ — aside

64. Cf. Klein, *Das Erfordernis der verbuergten Gegenseitigkeit bei Vollstreckung auslaendischer Urteile in Deutschland*, 6 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT-UND STRAFRECHT (BÖHM'S ZEITSCHRIFT) 97, 99 (1896). It might be interesting to note that the Prussian draft of 1863 — prior to the wars of 1866 and 1870 — following the Prussian General Judicial Ordinance (1793) did not contain a reciprocity angle. However, during the first half of the nineteenth century the courts had read it into the law. And the Report on the draft expressed "the hope," that the courts would also in the future follow the practice to deny enforcement where the foreign-judgment state does not grant it. "Motives" (to the draft) 247, quoted by Wittmaack, *Kann ein Vollstreckungsurteil nach §§ 722 und 723 ZPO auf Grund eines nordamerikanischen, insbesondere kalifornischen Urteils erlassen werden?*, in 22 NIEMEYER'S ZEITSCHRIFT 1, 9 (1912).

65. Germany: ZPO § 1944; ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVIL-PROZESSRECHTS* 820 *et seq.* (6th ed. 1954).

66. Cf. ERNST, *GEGENSEITIGKEIT UND VERGELTUNG IM INTERNATIONALEN PRIVATRECHT* 95 (1950); WOLFF, *PRIVATE INTERNATIONAL LAW* 257 (2d ed. 1950).

67. See *Fall v. Eastin*, 215 U.S. 1 (1909).

68. *Wetboek van Burgerlijke Regtvordering* art. 431; JITTA, *INTERNATIONAAL PRIVAATRECHT* 170 (1916).

from a few exceptions in admiralty law — enforcement, however, being distinguished from recognition.⁶⁹

Illustrations for the *second* approach are supplied by those countries which require the observation of reciprocity even for a mere recognition of a foreign judgment in personam, so that such a judgment lacks conclusive effect. Illustrative is the law of Denmark,⁷⁰ Spain,⁷¹ Germany,⁷² and Austria.⁷³

The *third* group is represented by the Italian law. Originally, the law required no more than a declaration of executability by the court in the forum — a so-called *giudizio di delibazione* which was to be granted upon the compliance with the generally stated requirements, none of which referred to reciprocity.⁷⁴ Only later, modifications, particularly those enacted during the era of fascism, changed the picture profoundly,⁷⁵ a process which has properly been termed one of nationalistic protectionism in the field of law.⁷⁶ It seems that the present Code⁷⁷ has returned to traditional Italian liberalism — but the question, whether reciprocity is eliminated, is disputed.⁷⁸

69. Not only the Netherlands make such a distinction, but even many countries in which reciprocity is a requisite. However, this distinction has no basis in the law of the United States (federal jurisdiction) or in Germany (with some qualification for matrimonial judgments) and Austria. See WOLFF, *PRIVATE INTERNATIONAL LAW* 254 (2d ed. 1950). His proper formulation: "Only in the countries in which enforcement depends on reciprocity can a doubt arise whether mere recognition, and in particular, the effect of *res judicata*, are conditioned by reciprocity."

70. Denmark: Civil Procedure Act of May 19, 1909, *as amended*, Act of May 10, 1932, §§ 223a, 479: Recognition upon condition of reciprocity established by treaties failing which recognition may be had where royal order expresses the existence of reciprocity with the foreign country. Execution in either case calls for a court decree.

71. Spain: LEY DE ENJUICIAMIENTO CIVIL (Code of Civil Procedure) arts. 952, 953 (1881). In absence of a treaty, the principle of material reciprocity controls, i.e., a judgment has the same effect as a Spanish judgment has in the judgment State. See also ERNST, *GEGENSEITIGKEIT UND VERGELTUNG IM INTERNATIONALEN PRIVATRECHT* 118 *et seq.* (1950).

72. Germany: ZPO § 328 as for judgments on rights which relate to money or money's value.

73. Austria: EXEKUTIONSORDNUNG (Act concerning executions) § 79. *Cf.* RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 525 (1949).

74. Italy: CODICE CIVILE art. 10 of the Preliminary Title (1865); CODICE DI PROCEDURA CIVILE arts. 941-950 (1865).

75. DECRETO-LEGGE of July 20, 1919, and particularly the act of May 28, 1925.

76. ERNST, *GEGENSEITIGKEIT UND VERGELTUNG IM INTERNATIONALEN PRIVATRECHT* 99 (1950), with reference to the fact that representative Italian internationalists as Diena felt that with so many other countries having, in spite of Italy's liberal attitude, enacted the reciprocity requirement, Italy had been "cheated" and was, therefore, forced to change its attitude.

77. CODICE DI PROCEDURA CIVILE art. 797 (1940), *as amended*, law of July 14, 1950, No. 581.

78. The provision of article 797 of the new *Codice* enumerates all the requirements for the enforcement of a foreign judgment, and reciprocity is not one of them. But it is a prerequisite for the recognition of the competence of the foreign

At this date, France's legal system does not include a reciprocity feature; but article 105 of the draft of a revised Code provides that no *exequatur* for an execution shall be granted where the judgment in question comes from a foreign country in which French decisions cannot form the basis for execution.⁷⁹

VI

The influence of nationalistic emotionalism is, as the history of the last century and of more than a half of this century proves, hard to break. That the task to break it is a hard one can be seen from the topic discussed in the preceding section. The legal experts have been fully aware of the errors underlying the postulate of reciprocity concerning the treatment of foreign judgments. They have also referred to the great fallacy which lies in the belief that the interests of a nonresident national are advanced by a policy which is averse to such an enforcement of a judgment only because it is a foreign one. It has been properly pointed out that the insistence on reciprocity serves only to mislead the forum by diverting its attention from the real question, that is, the question of whether the judgment shows that the particular national had become the victim of serious injustice.⁸⁰

Courts dealing with a case concerning a foreign judgment have always felt it their duty to give consideration to the question whether the way in which the judgment was obtained had been in accordance with procedural fair play and natural justice. Thus, strong safeguards prevent a questionable foreign decision from obtaining the quality of conclusiveness.⁸¹

Concerning the question of whether reciprocity is able to supply such a safeguard, it will be sufficient to call attention to an important point. There are States whose administration of justice might, to use a mild expression, not be regarded as a model of perfection. However, by compliance with the reci-

court, article 4(4), which in turn is one of the requirements for the enforcement of the judgment. On the controversial relation of article 797 to article 4(4), see MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE 322 *et seq.* (1954).

79. For details, see Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184 (1952).

80. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 793 (1950).

81. Lenhoff, *Die Anerkennung und Vollstreckung auslaendischer Urteile in U.S.A.*, 19 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 201, 224 (1954).

procuity requirement they may secure for their judgments the preferred status in a country which is outstanding for the high degree of judicial administration.⁸²

From the preceding description of the relatively recent rise of the reciprocity feature in the law of foreign judgments it must be apparent that the difference in the place of reciprocity between international judicial assistance and the treatment of foreign judgments is momentous. In the present circumstances in which the international community of States lacks a legal machinery of its own, the observance of reciprocity is the alternative for an adequate administration of justice in cases requiring service of a papers and taking of evidence abroad. Manifestly this is only one instance of the all-pervasiveness of reciprocity which is visible in each and every aspect of international law.

Unfortunately, it has not yet been fully realized that with regard to the question of which effect should be given a foreign judgment neither a problem of international law nor one of a policy involving national dignity confronts the forum. The requirements of reciprocity is, from the standpoint of juristic logic, an arbitrary and, from the standpoint of legal policy, an undesirable one.

82. Süss, *Die Anerkennung auslaendischer Urteile*, in BEITRAEGE ZUM ZIVIL-PROZESSRECHT (FESTGABE FÜR LEO ROSENBERG) 229 (1949); Schima, *The Present Status of International Procedural Law*, 73 JURISTISCHE BLÄTTER 522, 524 (1951).